

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 19-0304 BLA

DONNIE W. HARRISON)

Claimant-Respondent)

v.)

UNICORN MINING INCORPORATED)

and)

DATE ISSUED: 05/22/2020

AMERICAN INTERNATIONAL)
SOUTH/CHARTIS)

Employer/Carrier-)
Petitioners)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Scott R. Morris,
Administrative Law Judge, United States Department of Labor.

Cameron Blair and Andrew L. Kenney (Fogle Keller Walker PLLC),
Lexington, Kentucky, for employer/carrier.

Before: ROLFE, GRESH, JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its carrier (employer) appeal the Decision and Order Awarding Benefits (2017-BLA-05577) of Administrative Law Judge Scott R. Morris rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on November 24, 2015.¹

The administrative law judge found claimant established complicated pneumoconiosis and thus invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, and established a change in an applicable condition of entitlement.² 30 U.S.C. §921(c)(3); 20 C.F.R. §§718.304, 725.309. The administrative law judge also found claimant's complicated pneumoconiosis arose out of his coal mine employment and therefore awarded benefits. 20 C.F.R. §718.203.

On appeal, employer argues the administrative law judge erred in finding claimant established complicated pneumoconiosis. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.³

The Board's scope of review is defined by statute. We must affirm the administrative law judge's decision and order if it is rational, supported by substantial evidence, and in accordance with applicable law.⁴ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

¹ Claimant filed three prior claims for benefits, each of which were denied for failure to establish any element of entitlement. Director's Exhibits 1-3.

² Where a claimant files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). To obtain review of the merits of his claim, claimant had to establish one element of entitlement.

³ We affirm, as unchallenged on appeal, the administrative law judge's finding of twenty years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6.

⁴ Claimant's last coal mine employment occurred in Kentucky. Hearing Transcript at 24. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

Section 411(c)(3) of the Act provides an irrebuttable presumption a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more large opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. In determining whether claimant has invoked the irrebuttable presumption, the administrative law judge must weigh all evidence relevant to the presence or absence of complicated pneumoconiosis. 30 U.S.C. §923(b); *see Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

The administrative law judge concluded “the x-ray evidence supports a finding claimant has large pulmonary opacities; the biopsy evidence neither supports nor disproves the existence of massive lesions; and the other medical evidence neither support[s] nor disproves the existence of complicated pneumoconiosis.” Decision and Order at 15. Thus, he found claimant established complicated pneumoconiosis and invoked the irrebuttable presumption. Employer challenges the administrative law judge’s weighing of the x-rays and of Dr. Rosenberg’s opinion evaluating claimant’s computed tomography (CT) scans.

X-ray Evidence - 20 C.F.R. §718.304(a)

The administrative law judge considered eight interpretations of three x-rays. Decision and Order at 8-9. All of the interpreting physicians are dually qualified as Board-certified radiologists and B readers. *Id.* Dr. DePonte read the September 16, 2015 x-ray positive for simple and complicated pneumoconiosis, Category A, while Dr. Tarver read it negative for both forms of the disease. Director’s Exhibits 12, 14. Drs. DePonte and Miller read the January 13, 2016 x-ray positive for simple and complicated pneumoconiosis, Category A, while Drs. Adcock and Meyer read it as positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Director’s Exhibits 11, 13, 31; Employer’s Exhibit 1. Dr. DePonte also read the August 28, 2017 x-ray positive for simple and complicated pneumoconiosis, Category A, while Dr. Tarver read it positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Claimant’s Exhibit 1; Employer’s Exhibit 4.

The administrative law judge noted “[e]very interpretation except for Dr. Tarver’s interpretation of Claimant’s September 2015 [x]-ray recorded the presence of simple pneumoconiosis, and four out of the eight interpretations found complicated pneumoconiosis based on the presence of large ‘A’ opacities.” Decision and Order at 10. He gave less weight to Dr. Tarver’s negative reading for simple and complicated pneumoconiosis of the September 16, 2015 x-ray and found it positive for both forms of

the disease based on Dr. DePonte's reading. *Id.* He found the January 13, 2016 and August 28, 2017 x-rays in equipoise because they had an equal number of positive and negative readings from equally qualified physicians. *Id.* Weighing the x-ray evidence as a whole, the administrative law judge found claimant established complicated pneumoconiosis. *Id.*

Employer asserts the administrative law judge did not adequately explain why he rejected Dr. Tarver's negative reading of the September 16, 2015 x-ray. Employer's Brief at 8 (unpaginated). We disagree. The administrative law judge accurately noted "[e]very other dually-qualified radiologist interpreted [c]laimant's [x]-rays from September 2015 to August 2017 as showing at least simple pneumoconiosis *in all zones*, most at a profusion of 2/1 or greater." Decision and Order at 10. Moreover, he accurately found claimant's biopsy and CT scan evidence "confirms" the presence of simple pneumoconiosis in 2015.⁵ *Id.*

To the extent Dr. Tarver did not identify any opacities consistent with simple pneumoconiosis on the September 16, 2015 x-ray, the administrative law judge permissibly considered his interpretation "an outlier amongst all the other [x]-ray interpretations of record from this period."⁶ Decision and Order at 10; *see Snorton v. Zeigler Coal Co.*, 9

⁵ Dr. Caffrey reviewed slides from a needle biopsy performed on September 16, 2014. Employer's Exhibit 3. He opined the biopsy slides showed simple pneumoconiosis and stated "it is possible [claimant] may have complicated pneumoconiosis," but was unable to make the latter diagnosis based on the size of the biopsy specimens. *Id.* Claimant's treatment records include the following CT scans: A July 30, 2015 CT scan described areas of subpleural scarring or nodularity consistent with claimant's prior diagnosis of coal workers' pneumoconiosis (Claimant's Exhibit 5 at 2); a December 10, 2015 CT scan described pleural-parenchymal thickening and nodularity and scattered nodules consistent with claimant's history of coal workers' pneumoconiosis (Claimant's Exhibit 4 at 3); and a March 10, 2016 CT scan also described hypermetabolic mediastinal lymphadenopathy and low-grade diffuse subpleural scarring/nodularity likely related to pneumoconiosis (Employer's Exhibit 4 at 1-2).

⁶ Dr. DePonte opined the September 16, 2015, January 13, 2016, and August 28, 2017 x-rays showed small opacities, profusion 2/1, in all lung zones with coalescence. Director's Exhibits 11, 12; Claimant's Exhibit 1. Dr. Miller opined the January 13, 2016 x-ray showed small opacities, profusion 2/2, in all lung zones with coalescence. Director's Exhibit 13. Dr. Meyer opined the January 13, 2016 x-ray showed small opacities, profusion 1/2, with coalescence. Employer's Exhibit 1. Dr. Adcock opined the January 13, 2016 x-ray showed small opacities, profusion 2/2, throughout all the lung zones. Director's Exhibit 31. Dr. Tarver read the August 28, 2017 x-ray as positive for simple

BLR 1-106 (1986) (administrative law judge may reasonably question validity of a physician's opinion that varies significantly from the remaining medical opinions of record). Because Dr. Tarver "failed to perceive [on the September 15, 2016 x-ray] the presence of small opacities consistent with simple pneumoconiosis *in any zones*," we see no error in the administrative law judge's finding that "[his] reading is simply not credible on the related question of whether any large opacities were present" on that film. Decision and Order at 10; *see Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). Thus, we affirm the administrative law judge's rejection of it.

Employer also asserts Dr. DePonte's identification of a Category A large opacity on the September 16, 2015 x-ray is equivocal based on her additional comments on the ILO form she completed.⁷ Employer's Brief at 8-9 (unpaginated). Employer's argument amounts to a request that the Board reweigh the credibility of evidence, which we are not empowered to do. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the administrative law judge permissibly relied on Dr. DePonte's classification of a Category A opacity, we affirm his finding that the September 5, 2016 x-ray is positive for complicated pneumoconiosis. Decision and Order at 10; *see Barrett*, 478 F.3d at 356; *Rowe*, 710 F.2d at 255.

Additionally, we reject employer's argument the administrative law judge erred in not giving greater weight to the readings of the more recent x-rays he found in equipoise for complicated pneumoconiosis. *See Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993); *see also Thorn*, 3 F.3d at 718 (4th Cir. 1993) ("A bare appeal to 'recency' is an abdication of rational decisionmaking."); Employer's Brief at 11-12 (unpaginated). The administrative law judge properly performed both a qualitative and quantitative analysis of the conflicting x-ray readings, taking into consideration the qualifications of the physicians, and permissibly concluded claimant satisfied his burden of proof. *See* 20 C.F.R. §718.202(a)(1); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59 (6th Cir. 1995); *Woodward*, 991 F.2d at 321. Because it is supported by substantial evidence, we affirm the administrative law judge's finding claimant established complicated pneumoconiosis based on the x-ray evidence. 20 C.F.R. §718.304(a).

pneumoconiosis, profusion 1/1, in the middle and upper lung zones only. Employer's Exhibit 4.

⁷ Dr. DePonte wrote "subtle large opacity suspected versus pleural thickening" and recommended a CT scan. Director's Exhibit 12.

CT Scans and Dr. Rosenberg's Opinion – 20 C.F.R. §718.304(c)⁸

The administrative law judge considered five CT scans in claimant's treatment records, dated December 10, 2014, April 23, 2015,⁹ July 30, 2015, December 10, 2015, and March 10, 2016. Decision and Order at 12-13; Claimant's Exhibits 4-6. The administrative law judge gave the CT scans no probative weight because "none of the interpreting radiologists' credentials are in the record." Decision and Order at 13. Furthermore, he noted that none of the interpreting radiologists mention the presence or absence of "complicated pneumoconiosis," or address whether claimant has a condition that would satisfy the regulatory definition of complicated pneumoconiosis at 20 C.F.R. §718.304(a) or (b). *Id.* The administrative law judge also rejected Dr. Rosenberg's opinion, based on his review of the CT scan evidence, that claimant does not have complicated pneumoconiosis. *Id.* at 14.

Contrary to employer's contention, we see no error in the administrative law judge's weighing of Dr. Rosenberg's opinion. Employer's Brief at 9-10 (unpaginated). Dr. Rosenberg explained that "while parenchymal changes are described [on the CT scans], any nodularity is said to be *subcentimeter* in nature" and therefore insufficient to diagnose complicated pneumoconiosis. Employer's Exhibit 2 (emphasis added). The administrative law judge accurately noted only the December 10, 2014 scan described "small scattered subcentimeter nodules" while subsequent scans on April 23, 2015, and July 30, 2015, reported "nodular increases." Decision and Order at 13; *see* Claimant's Exhibit 5 at 2, 4.

Moreover, the administrative law judge accurately found the December 10, 2014 scan showed, in addition to subcentimeter nodules, a "fibrotic appearing pleuroparenchymal density" in the right upper lung consistent with Dr. Miller's identification of a large Category A opacity on the January 13, 2016 x-ray in the same location. Decision and Order at 13; *see* Director's Exhibit 13. The administrative law judge permissibly found Dr. Rosenberg's opinion unpersuasive because he did not address why the density is not complicated pneumoconiosis. *See Barrett*, 478 F.3d at 356; *Rowe*,

⁸ The administrative law judge found claimant's treatment records include diagnoses of complicated pneumoconiosis but the treating physicians did not adequately explain the bases for their diagnoses. Decision and Order at 14-15; Claimant's Exhibit 6. He found Dr. Ajjarapu's opinion that claimant has complicated pneumoconiosis insufficiently reasoned. Decision and Order at 15; Director's Exhibit 11.

⁹ The administrative law judge references an April 30, 2015 CT scan. Decision and Order at 12. The record reflects claimant underwent a PET scan with CT scan on April 23, 2015, which was interpreted on April 30, 2015. Claimant's Exhibit 5.

710 F.2d at 255; Decision and Order at 13-14. We therefore affirm the administrative law judge's findings that the CT scan evidence and Dr. Rosenberg's opinion "neither supports nor disproves" that claimant has complicated pneumoconiosis. Decision and Order at 14.

Conclusion

The administrative law judge discussed all the relevant evidence, and his determination that claimant has complicated pneumoconiosis is supported by substantial evidence. *See Gray*, 176 F.3d at 388-89; *Melnick*, 16 BLR at 1-33-34. We therefore affirm the administrative law judge's findings claimant invoked the irrebuttable presumption and established a change in an applicable condition of entitlement. 20 C.F.R. §§718.304, 725.309. We further affirm, as unchallenged on appeal, the administrative law judge's finding that claimant's complicated pneumoconiosis arose out of his coal mine employment. *See* 20 C.F.R. §718.203(b); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 15.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge